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11 PROVIDENT LIFE AND ACCIDENT

12 INSURANCE COMPANY and GROUP

13 LONG TERM DISABILITY PLAN

14 for HELLER, ERHMAN, WHITE & MCAULIFFE

15 **UNITED STATES DISTRICT COURT**

16 **NORTHERN DISTRICT OF CALIFORNIA**

17 PATRICIA GALVIN

18 Plaintiff,

19 vs.

20 PROVIDENT LIFE AND ACCIDENT

21 INSURANCE COMPANY as Administrator

22 and Fiduciary of the GROUP LONG TERM

23 DISABILITY PLAN for HELLER, ERHMAN,

24 WHITE & MCAULIFFE, and the GROUP

25 LONG TERM DISABILITY PLAN for

26 HELLER, ERHMAN, WHITE &

27 MCAULIFFE,

28 The Plan.

) Case No.: C07-05195 JF

) **DEFENDANT GROUP LONG TERM**
) **DISABILITY PLAN for HELLER,**
) **ERHMAN, WHITE & MCAULIFFE'S**
) **ANSWER TO PLAINTIFF'S**
) **COMPLAINT**

1 Defendant Group Long Term Disability Plan for Heller, Erhman, White & McAuliffe
2 (“the Plan”) responding for itself, and for no other defendant, answers Plaintiff Patricia Galvin’s
3 (“plaintiff”) Complaint in this matter (“the complaint”) as follows:
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5 **JURISDICTION**

6 1. Answering the allegations of paragraph 1 of the complaint, the Plan admits the
7 allegations.

8 **VENUE**

9 2. Answering the allegations of paragraph 2 of the complaint, the Plan denies that
10 any wrongful conduct took place and admits that venue is proper in this judicial district.

11 **INTRADISTRICT ASSIGNMENT**

12 3. Answering the allegations of paragraph 3 of the complaint, the Plan admits the
13 allegations.

14 **PARTIES**

15 4. Answering the allegations of paragraph 4 of the complaint, the Plan admits the
16 allegations.

17 5. Answering the allegations of paragraph 5 of the complaint, the Plan admits that it
18 was insured under an insurance policy issued by defendant Provident Life and Accident
19 Insurance Company but that the Plan documents speak for themselves.

20 6. Answering the allegations of paragraph 6 of the complaint, the Plan responds that
21 the Plan documents and the ERISA statute speak for themselves. The Plan further responds that
22 this allegations calls for a legal conclusion

23 7. Answering the allegations of paragraph 7 of the complaint, the Plan is without
24 information or belief to answer the allegations of said paragraph and on that ground, denies said
25 allegations.

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FACTS COMMON TO ALL CLAIMS

8. Answering the allegations of paragraph 8 of the complaint, the Plan admits the allegations.

9. Answering the allegations of paragraph 9 of the complaint, the Plan admits that plaintiff filed a claim for long term disability benefits in or about January, 2003, but denies each and every remaining allegation of said paragraph and specifically denies that plaintiff is disabled.

10. Answering the allegations of paragraph 10 of the complaint, the Plan admits the allegations.

11. Answering the allegations of paragraph 11 of the complaint, the Plan denies the allegations.

12. Answering the allegations of paragraph 12 of the complaint, the Plan denies the allegations.

13. Answering the allegations of paragraph 13 of the complaint, the Plan denies the allegations.

14. Answering the allegations of paragraph 14 of the complaint, the Plan admits that plaintiff appealed the denial of her benefits but denies the remaining allegations of said paragraph and specifically denies that plaintiff is entitled to any benefits under the policy.

15. Answering the allegations of paragraph 15 of the complaint, the Plan admits the allegations.

16. Answering the allegations of paragraph 16 of the complaint, the Plan admits that plaintiff filed a second claim for disability benefits, that the claim was denied and that the appeal of that claim was denied. The Plan denies all other remaining allegations of said paragraph.

17. Answering the allegations of paragraph 17 of the complaint, the Plan admits the allegations.

18. Answering the allegations of paragraph 18 of the complaint, the Plan admits the allegations.

19. Answering the allegations of paragraph 19 of the complaint, the Plan denies the allegations.

AFFIRMATIVE DEFENSES

FIRST AFFIRMATIVE DEFENSE

As a first affirmative defense, the Plan alleges that plaintiff's claims for relief, subject to court determination, are interpreted pursuant to The Employee Retirement Income Security Act ("ERISA").

SECOND AFFIRMATIVE DEFENSE

As a second affirmative defense, the Plan alleges that neither plaintiff's complaint nor any claim for relief therein state facts sufficient to constitute a cause of action against the Plan.

THIRD AFFIRMATIVE DEFENSE

As a third affirmative defense, the Plan alleges, on information and belief, that through plaintiff's conduct, to be determined by the court as comparative or contributory fault, plaintiff has waived and relinquished, or is estopped to assert, every claim for relief asserted in her complaint.

FOURTH AFFIRMATIVE DEFENSE

As a fourth affirmative defense, the Plan alleges, on information and belief, that any damages sustained by plaintiff by reason of the events alleged in her complaint were proximately caused or contributed to by plaintiff's conduct, to be determined by the court.

FIFTH AFFIRMATIVE DEFENSE

As a fifth affirmative defense, the Plan alleges, on information and belief, that plaintiff's damages and/or policy benefits, to be determined by the court, are subject to reduction and/or elimination pursuant to offset and/or policy limitations.

SIXTH AFFIRMATIVE DEFENSE

As a sixth affirmative defense, the Plan alleges that plaintiff has failed to satisfy all conditions precedent to receipt of benefits under the policy.

SEVENTH AFFIRMATIVE DEFENSE

As a seventh affirmative defense, the Plan alleges, on information and belief, that plaintiff, as to be determined by the court, is barred and estopped by the equitable doctrine of unclean hands from seeking or obtaining any recovery against the Plan by reason of her

1 complaint.

2 **EIGHTH AFFIRMATIVE DEFENSE**

3 As an eighth affirmative defense, the Plan denies that plaintiff has sustained any injury or
4 damage by any act or omission by the Plan. However, if it is established that plaintiff suffered
5 an injury or damage for which the Plan is held liable, the Plan alleges that such injury or damage
6 is to be determined by the court as proximately caused or contributed to by the intervening
7 negligence or wrongful acts of plaintiff, or others acting for or on her behalf and that those
8 negligent and/or wrongful acts by plaintiff or others, eliminate and/or reduce any damages
9 plaintiff can recover from the Plan in this action.

10 **NINTH AFFIRMATIVE DEFENSE**

11 As a ninth affirmative defense, the Plan alleges that any and all losses or damages
12 sustained by plaintiff, as a result of the occurrences alleged in the complaint, are to be
13 determined by the court as proximately caused in whole or in part by the negligence or fault of
14 persons or entities other than the Plan, and for whom the Plan is not responsible. The negligence
15 and fault of other persons or entities eliminates or reduces any damages plaintiff may recover
16 from the Plan in this action.

17 **TENTH AFFIRMATIVE DEFENSE**

18 As a tenth affirmative defense, the Plan alleges that plaintiff, as to be determined by the
19 court, failed to exercise reasonable care and diligence to mitigate her damages, if she has any.
20 As a consequence, plaintiff's claim should be barred, or alternatively, any damages awarded to
21 plaintiff should be reduced in proportion to plaintiff's fault in failing to mitigate her damages.

22 **ELEVENTH AFFIRMATIVE DEFENSE**

23 As an eleventh affirmative defense, the Plan alleges that plaintiff's claims for relief, as to
24 be determined by the court, are barred by the principle of unjust enrichment.

25 **TWELFTH AFFIRMATIVE DEFENSE**

26 As a twelfth affirmative defense, the Plan alleges that each and every act or statement
27 done or made by the Plan, or by the Plan agents or employees, with reference to plaintiff, before
28 and after plaintiff filed her original complaint, was privileged as a good faith assertion of the

1 Plan's legal and contractual rights.

2 **THIRTEENTH AFFIRMATIVE DEFENSE**

3 As a thirteenth affirmative defense, the Plan alleges that plaintiff is not entitled to any
4 further benefits or any other compensation under the Plan.

5 **FOURTEENTH AFFIRMATIVE DEFENSE**

6 As a fourteenth affirmative defense, the Plan alleges that plaintiff's claims for relief are
7 barred by the parol evidence rule.

8 **FIFTEENTH AFFIRMATIVE DEFENSE**

9 As a fifteenth affirmative defense, the Plan alleges that plaintiff's complaint is barred by
10 the applicable statutes of limitations.

11 **SIXTEENTH AFFIRMATIVE DEFENSE**

12 As a sixteenth affirmative defense, the Plan alleges that the claim decision was correct
13 and proper under the terms of the policy.

14 **SEVENTEENTH AFFIRMATIVE DEFENSE**

15 As a seventeenth affirmative defense, the Plan alleges that plaintiff, by virtue of the legal
16 doctrines of waiver and laches, as to be determined by the court, is estopped from pursuing some
17 or all of the claims alleged against the Plan.

18 **EIGHTEENTH AFFIRMATIVE DEFENSE**

19 As an eighteenth affirmative defense, the Plan alleges that plaintiff is not entitled to
20 attorneys' fees or damages in the amount of future benefits pursuant to any of the claims for
21 relief alleged in her complaint.

22 **NINETEENTH AFFIRMATIVE DEFENSE**

23 As a nineteenth affirmative defense, the Plan alleges that plaintiff's damage claim, if any,
24 is limited by the provisions of Insurance Code Section 10111.

25 **TWENTIETH AFFIRMATIVE DEFENSE**

26 As a twentieth affirmative defense, the Plan alleges that the Court should employ the
27 abuse of discretion standard of review.

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TWENTY-FIRST AFFIRMATIVE DEFENSE

As a twenty-first affirmative defense, the Plan alleges that plaintiff's complaint and each and every cause of action therein, is barred by plaintiff's failure to exhaust her administrative remedies.

TWENTY-SECOND AFFIRMATIVE DEFENSE

As a twenty-second affirmative defense, the Plan reserves its right to assert additional defenses based on information gathered in the course of additional investigation and discovery.

PRAYER FOR RELIEF

WHEREFORE, the Plan prays for judgment to be determined by the court in its favor as follows:

1. That plaintiff take nothing by reason of her complaint on file herein;
2. That the Plan be awarded its costs and expenses incurred in this action;
3. That the Plan be awarded its attorneys' fees incurred in this action; and
4. That the Plan recover such other and further relief as the court may deem just and proper.

KELLY, HERLIHY & KLEIN LLP

Dated: January __, 2008

By _____/s/_____

John C. Ferry

Attorneys for Defendants

PROVIDENT LIFE AND ACCIDENT INSURANCE COMPANY
and GROUP LONGER TERM DISABILITY PLAN for HELLER,
ERHMAN, WHITE & MCAULIFFE

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